IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

FRIDAY, THE 20TH JULY 2007 / 29TH ASHADHA 1929

WA.No. 715 of 2007(B)

AGAINST THE JUDGEMENT IN W.P.(C).NO.17897/2006 DATED 20/12/2006 OF THIS COURT.

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APPELLANT/RESPONDENT NO.3 IN W.P(C):

M.L.JOSEPH FRANCIS, DISTRICT & SESSIONS JUDGE, TRICHUR SELECTION GRADE DISTRICT JUDGE, (ON ORDERS OF PROMOTION AS DISTRICT JUDGE, SUPER TIME SCALE).

BY ADV. SRI.A.X.VARGHESE,
SRI.A.V.JOJO,
SMT.M.R.JAYALATHA.

RESPONDENTS/PETITIONER/RESPONDENTS 1 & 2 IN W.P(C):
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1. **SRI.THOMAS.P.JOSEPH, DISTRICT & SESSIONS JUDGE, KOZHIKODE.**

2. **HIGH COURT OF KERALA, REPRESENTED ITS REGISTRAR,(SUBORDINATE JUDICIARY), ERNAKULAM.**

3. **S.SAINUDEEN, LAW SECRETARY (ON DEPUTATION) GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**

BY ADV. SRI.BECHU KURIAN THOMAS FOR R1,
ADV. SRI. O.V. RADHAKRISHNAN FOR R2,
ADV. SRI. P. RAVINDRAN FOR R3.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD 29/06/2007, ALONG WITH W.A NO. 716/2007 AND CONNECTED CASES, THE COURT ON 20/07/2007, DELIVERED THE FOLLOWING:

K.BALAKRISHNAN NAIR
& T.R.RAMACHANDRAN NAIR, JJ.

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WA NOS.715,716,719,776,778,785,843,844 & 845 OF 2007

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Judgment

Balakrishnan Nair, J.

These nine Writ Appeals arise out of the common Judgment of the learned Single Judge dated 20.12.2006, in Writ Petition (C) Nos.17897, 18004 and 18608 of 2006. Three of the Appeals have been filed by the High Court and the remaining, by the two affected party respondents in the Writ Petitions. The promotions granted to those party respondents from the post of Selection Grade District Judge to the Super Time Scale with retrospective effect, were challenged by three of their juniors in the cadre of Selection Grade District Judge, but who were promoted to the super time scale, earlier. The learned Single Judge treated Writ Petition (C) No.17897/06 as the main case. So, for convenience, we are treating WA No.715/07, which is one of the three Writ Appeals filed against the Judgment in the said Writ Petition, as the main case for the purpose of referring to the exhibits.

2. The appellant in WA No.715/07 is the third respondent and the first respondent is the petitioner in Writ Petition (C) No.17897/06. The appellant and respondents 1 and 3 in this Writ Appeal were Selection Grade District Judges. The third respondent and the appellant were seniors in the said cadre, when compared to the 1st respondent. The post of Selection Grade District and Sessions Judge is one, borne on the Kerala State Higher Judicial Service. The said service consists of two categories, namely, District and Sessions Judge, including Additional District and Sessions Judge, forming Category (2) and Selection Grade District and Sessions Judge, forming Category (1). The method of appointment to the post of Selection Grade District and Sessions Judge is by promotion from Category (2), made on the basis of merit and ability. Seniority is considered only where merit and ability are approximately equal.

3. The Shetty Commission, appointed to make suggestions for improvement of the service conditions of the Judicial Officers, suggested creation of a Super-time Scale for granting further promotion to Selection Grade District and Sessions Judges. The Kerala Government, accepting the suggestions made by the Shetty Commission, issued GO(MS)

No.231/2001/Home dated 12.12.2001, providing inter alia, for creation of Super-time Scale posts. As per the said GO, 10% of the Selection Grade District Judges, who have put in not less than three years' service in the selection grade, will be allowed the super time scale. The promotion is to be made, based on merit-cum-seniority basis. It means, merit will be the guiding factor and seniority will be considered, when merit is more or less equal. The said GO is produced as Ext.P2 in the Writ Petition. Based on that GO, by Ext.P3 order of the High Court dated 01.09.2004, seven posts were created as Super Time Scale posts and Officers were promoted to the vacancies that arose in those seven posts, from time to time, from 01.01.1996. By the said order, the third respondent was superseded by five of his juniors from Sri.M.N.Krishnan to Sri.K.Chenthamarakshan, who were promoted to the Super-time Scale, between 30.04.2003 and 01.06.2004. Later, by Ext.P4 order dated 02.11.2004, the first respondent/petitioner, along with other petitioners in the connected two Writ Petitions, was promoted to the Super Time Scale with effect from 13.10.2004, 14.10.2004 and 28.10.2004 respectively. The case of the appellant and the third respondent herein, was also considered for placement in the Super Time Scale, but their case was

deferred to be considered on a later date.

4. The appellant and the third respondent were not promoted, apparently, for the reason of some adverse remarks in their confidential reports. Later, the High Court, suo motu reconsidered the matter and by Ext.P6 order dated 06.01.2006, decided to promote the third respondent herein as Super Time Scale District Judge, with effect from 01.05.2003 and the appellant, with effect from 01.09.2004. The result of the said promotion was that they became seniors to the writ petitioner and also the petitioners in the connected Writ Petitions in the grade of Super Time Scale. The 1st respondent/petitioner submitted Ext.P7 representation dated 30.01.2006 before the High Court, objecting to the retrospectivity given to the promotion of the third respondent and the appellant, and also praying to restore his seniority in the post of Super Time Scale District Judge. Their respective dates of promotion as per Ext.P6 are 27.10.2004, 28.10.2004 and 31.10.2004. The petitioners in the connected Writ Petitions have also filed similar representations. Those representations were considered together and rejected by the High Court by Ext.P8 order dated 19.06.2006.

5. The Writ Petition was filed, challenging Ext.P6 to the extent it promoted the third respondent and the appellant to the post of Super Time Scale District Judge with retrospective effect and also Ext.P8. The first respondent/petitioner also sought a declaration to the effect that the promotions granted to them shall not affect his seniority in the post of Super Time Scale District Judge. He contended that his seniority in the post of Super Time Scale District Judge with effect from 13.10.2004 cannot be disturbed by Ext.P6. The appellant and the third respondent were superseded by Exts.P3 and P4 respectively. Those orders have become final. He has a vested right of seniority over the appellant and the third respondent. The same is adversely affected by Ext.P6, which is impermissible. The seniors were superseded because of the adverse remarks in their confidential reports and those orders have become final. Having chosen not to challenge those orders, they are not entitled to get restoration of seniority now. One of the two applications of the appellant for expunging the adverse remarks was dismissed also. Therefore, the impugned orders are unsustainable, it is contended.

6. The High Court has filed a detailed counter affidavit in the Writ Petition, stating that the case of the appellant and the third respondent herein was deferred, only owing to certain adverse remarks in their confidential reports. Those adverse remarks were subsequently expunged and therefore, they were considered and promoted, taking into account, their up-to-date confidential reports also. Reference is made to Exts.R1(e) dated 14.06.2004, which is the minutes of the Administrative Committee, resolving to defer the case of the third respondent herein and also Ext.R1(f), which is the minutes of the Administrative Committee dated 09.08.2004, deciding to defer the case of the appellant herein. The High Court fully supports the impugned orders by saying that the incumbents whose case was reviewed and promotion was granted, are entitled to get restoration of seniority. The appellant and the third respondent have filed separate counter affidavits, supporting the impugned orders. Their contentions were more or less identical to the contentions of the High Court. The learned Single Judge, after hearing both sides, allowed the Writ Petition and quashed Exts.P6 and P8 orders of the High Court, to the extent, they gave retrospective promotion to the appellant and the third

respondent herein. The learned Single Judge found that the appellant and the third respondent herein, were superseded and the petitioners, who were their juniors, were promoted. Subsequently, the seniors were promoted, taking into account, the up-to-date confidential reports, which means, they became eligible for promotion only on considering the confidential reports for the subsequent period also. Therefore, they are liable to be promoted only prospectively. The learned Single Judge also found that the mere expunging of the adverse remarks will not make their confidential reports meritorious. So, it was held that even if the adverse remarks are expunged, they cannot be treated as meritorious candidates. So, the High Court was directed to issue fresh orders, giving promotion to them prospectively from 09.11.2005.

7. This Writ Appeal is filed, challenging the said Judgment, raising mainly the following grounds :

1. Placement in the Super Time Scale is only an up-gradation. There is no such category like Super Time Scale District Judge in the Special Rules. So the seniority in the lower category will govern the seniority in the upgraded category also.

2. The adverse remarks relate to the period 01.09.2003 to 31.1.2004, which

was written by the Controlling Judge on 14.06.2004. Even before that, he became eligible and was liable to be promoted, it is submitted.

3. In view of the original seniority in the cadre of Selection Grade District Judge, the retrospective effect given to his promotion is valid.

4. The promotion was granted with the approval of the Full Court and therefore, the same should not have been lightly interfered with by the learned Single Judge.'

On the above grounds, the appellant prayed for allowing the appeal.

8. We heard the learned counsel Mr.A.X.Varghese for the appellant, learned counsel Mr.Bechu Kurian Thomas for the 1st respondent, learned Senior Counsel Mr.O.V.Radhakrishnan for the second respondent and the learned counsel Mr.K.Ramachandran for the third respondent. We also heard learned counsel M/s.P.Ravindran and Ramesh Babu, appearing for the writ petitioners in the connected Writ Petitions, who are party respondents in the connected Writ Appeals. The learned counsel for the appellant Mr.A.X.Varghese reiterated the aforementioned contentions of the petitioner. The learned Senior Counsel Mr.O.V.Radhakrishnan, who appeared for the High Court made the following submissions :

When the adverse remarks in the confidential reports of the appellant and the third respondent were expunged, they were considered for promotion and rightly given promotion with retrospective effect. Their case for promotion was only deferred and when it was subsequently granted, the same was given with retrospective effect. The learned Senior Counsel also submitted that once promotion is granted to the appellant and the third respondent retrospectively, the consequential proceedings which were issued in the meantime in favour of the juniors will have to be modified accordingly. There is nothing wrong with the modification of their dates of promotion. Since the writ petitioners did not challenge the promotion granted to their seniors, they cannot challenge the retrospectivity given to it alone. The retrospectivity is the natural consequence of the promotion granted to them. The finding of the learned Single Judge that even after the removal of the adverse remarks, the appellant and the third respondent did not qualify for promotion is unsustainable, as the learned Single Judge has not made comparative evaluation of the confidential reports of the writ petitioners. Further, this Court cannot substitute its decision for the decision of the Selection Committee. The decisions relied on by the learned Single Judge were not applicable to the facts of the case, it is submitted. The

learned Counsel Sri.K.Ramachandran, who appeared for the third respondent also supported the contentions of the appellant and also of the Senior Counsel, who appeared for the High Court. Learned Counsel M/s.P.Ravindran, Ramesh Babu and Bechu Kurian Thomas, fully supported the findings and conclusions of the learned Single Judge. According to them, the appellant and the third respondent were actually superseded and they have chosen not to challenge those orders. So, the said orders gained finality. Further, they were given promotion now, taking into account, the up-to-date confidential reports also. So, they can be promoted only prospectively. The adverse remarks in the confidential reports of the appellant for most of the relevant period are remaining as such. Therefore, the very promotion given to the appellant is unjustified. At any rate, the retrospectivity given to the promotion is unwarranted, it is submitted.

9. From the side of the appellant and the third respondent, the following decisions were cited :

D.K.Agarwal v. High Court of Judicature (AIR 1988 SC 1403),***GP Sen Gupta v. Union of India*** (1983(2) LLJ 172), ***Mahender Singh v. Union of India*** (1991 Supp. (2) SCC 127) and ***Radha v. State of Kerala*** (2005(4) KLT

SN 17). The learned counsel for the High Court relied on the following decisions :

Badarinath v. Government of Tamil Nadu (2000) 8 SCC 395), ***Union of India v. Lt.General Rajendra Singh Kadyan*** (2000) 6 SCC 698), ***Syed.T.A. Naqshbandi v. State of Jammu and Kashmir*** (2003) 9 SCC 592), ***Bishwanath Prasad Singh v. State of Bihar*** (2001) 2 SCC 305) & ***Karam Pal v. Union of India*** (AIR 1985 SC 774).

10. On behalf of the writ petitioners, the decisions relied on are the following :

Mir Ghulam Hussan v. Union of India (1973) 4 SCC 135), ***Chairman, Railway Board v. C.R.Rangadhamaiah*** (AIR 1997 SC 3828), ***Union of India v. Lt.General Rajendra Singh Kadyan*** (2000) 6 SCC 698), ***Harigovind Yadav v. Rewa Sidhi Gramin Bank*** (2006 SCC (L&S) 1277), ***K.Samantha Ray v. National Insurance Company Limited*** (2004) 9 SCC 286), ***B.V.Sivaiah v. K.Addanki Babu*** (1998(6) SCC 720), ***Sankar Deb Acharya v. Biswanath Chakraborty*** (2007) 1 SCC 309).

11. The strength of Super Time Scale Posts is limited to seven posts. After the initial placement of seven Officers, other Officers were promoted as

and when vacancies arose in the said seven posts, as a result of elevation to the High Court,retirement etc. So, an incumbent can be promoted regularly, only when a substantive vacancy arises, provided he is qualified and suitable at the relevant time. So, the claim of the appellant that once he is promoted, his placement in that cadre will relate back to the original date, when his turn arose, cannot be accepted. When retrospective effect is given to a promotion, the incumbent is entitled to get monetary benefits from the said date. One cannot claim retrospective effect automatically on up-gradation with effect from the date, his turn arose and receive public money as salary. If he is not eligible on that date, he can be assigned date of promotion only with effect from the date on which he became entitled to be promoted, going by the criteria of merit and seniority. It is not clear from the records produced, the annual confidential reports of which period were taken into account. As per the provisions of the Rule 28(b)(i)(4) of Part II KS & SSR, the confidential reports of Officers for at least the preceding three years have to be considered by the DPC. In this case, the learned Senior Counsel appearing for the High Court submitted that the confidential reports for the preceding three years were relied on for ordering promotion, but, it is not clear, whether they were preceding

three calendar years or preceding three years with reference to the date of effect of the promotion. Going by the provisions in Rule 28 of KS & SSR, the confidential reports must be made up-to-date, by the 30th June of every year. By the end of that year, the DPC list for the next year should be published. The relevant provisions in this regard are Rule 28(b)(i)(4)(a), (b) and (d). The above provisions are quoted below for convenient reference :

> "(a) Select lists shall be prepared during a calendar year for the vacancies estimated to arise in the next calendar year ;
>
> (b) During the first six months of the year, action shall be taken to make all the Confidential Reports up-to-date, adverse remarks communicated and orders for expunging such remarks issued wherever necessary. Simultaneously, seniority lists shall also be made up-to-date and probation of officers in the field of choice declared. Confidential Reports and Seniority lists shall

be made up-to-date before 30th June.

.....

.....

(d) During September/October, the Departmental Promotion Committees will be convened and select lists prepared which will be notified before 30th November and in any case not later than December 31. If any officer becomes qualified after the preparation of the select list, but, before the occurrence of the vacancy, the Departmental Promotion Committee shall meet subsequently and his name shall be considered for inclusion in the select list."

Going by the above Rule, in the case of the appellant, who was promoted during the year 2004, his confidential reports upto 30.06.2003 can be reckoned. Similarly, in the case of the third respondent, who was promoted with effect from 01.05.2003, his confidential reports upto 30.06.2002 can be

reckoned. But, there is yet another overriding principle that the claim of an incumbent for promotion has to be considered with reference to the conditions on the date of occurrence of the vacancy. The said salutary principle finds statutory expression in the last part of Rule 28(b)(i)(4)(d), which is quoted above. The said principle is again reiterated in Rule 28(b)(i)(10), which reads as follows :

> "The claims of a person who qualifies himself for a post, after the select list in respect of that post has been prepared but before the date of occurrence of the vacancy in the higher post shall not be over looked."

In certain cases, the claim for promotion will be considered long after the occurrence of vacancy. In such cases, Rule 28(b)(iA) deals with the assessment of qualifications which includes the rating in the confidential reports. Rule 28(b)(iA) reads as follows :

> "**Preparation of select list subsequent to the occurrence of vacancy** : When a select list is prepared subsequent to the occurrence

> of a vacancy, no person who was not qualified for inclusion in the select list at the time of occurrence of the vacancy shall be included in the select list for appointment against that vacancy."

In this case, the High Court has the advantage of evaluating the eligibility of the third respondent and the appellant long after the date of occurrence of the vacancy. So, their confidential reports for a period of three years immediately preceding the dates on which their turn arose, can be considered. The provisions of the KS & SSR are applicable to promotions in the Kerala Higher Judicial Service. It is a service listed as Item 15A in the First Schedule to the KCS (CC & A) Rules. Rule 1 of Part II of the KS & SSR, which contains the General Rules, would show that it will apply to members of all services classified under the First Schedule mentioned above and also to those posts, not coming under a particular service, included in the First Schedule. Rule 1 of Part II KS & SSR reads as follows :

> "The rules in this Part shall apply to all State and Subordinate Services and to the holders

of all posts, whether temporary or permanent in any such service, appointed thereto before, or after the date on which these rules come into force as provided in sub-rule(b) of rule 1 in Part I except to the extent otherwise expressly provided (a) by or under any law for the time being in force or (b) in respect of any member of such service by a contract or agreement subsisting between such member and the State Government.

Provided that the rules in this Part shall also be applicable to holders of all posts in Government Service even though the posts they hold are not classified as coming under a particular service by including in Schedule I or Schedule II of the Kerala Civil Services (Classification, Control and Appeal) Rules 1960."

The Special Rules for every service under the State are treated as coming under Part III KS & SSR. To put it precisely, Part I KS & SSR contains the definitions, Part II contains the General Rules and Part III contains the Special Rules. The Special Rules are defined in Rule 2(16) of Part I KS & SSR, which reads as follows :

> "Special Rules shall mean the rules in Part III applicable to each service or class of service".

Rule 2 of Part II General Rules deals with the relation between the Special Rules and the General Rules. The said Rule reads as follows :

> "**Relation to the Special Rules** : If any provision in the general rules contained in the Part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall, in respect of that service, prevail over the provision in the general rules in this Part."

The above provisions are mentioned only to show that Rule 28 of Part II KS & SSR applies to promotion to the post of Super-time Scale District and Sessions

Judge, even if that post is not included in the Special Rules. By executive orders, the Government can create a new post and lay down the qualifications and method of appointment for that post validly. Promotion to such a post shall also be governed by Rule 28. So, the first ground taken by the appellant, which is noticed in paragraph 7 of this Judgment, cannot be upheld.

12. If an incumbent is superseded or his case is not considered or deferred for the reason that the confidential reports are adverse in a particular year and those remarks are expunged subsequently, the incumbent is entitled to get promotion with retrospective effect. The contention advanced on behalf of the writ petitioners that those who were promoted in the meantime cannot be touched, is plainly untenable. If a person is wrongly or illegally superseded or not considered and the said illegality is set right, the incumbent must be conceded right to get the promotion with retrospective effect. The provisions of Rule 28 of the KS & SSR concerning promotion, support this view. Further, Rule 29 of Part II KS & SSR also confers power on the Government to suo motu revise any promotion. The said Rule 29 reads as follows :

> "Revision of orders of appointment to selection posts - Subject to the provisions of

> Note (iiia) of sub-clause (7) and para (a) of sub-clause (8) of clause (i) of sub-rule (b) of Rule 28, an order appointing a member of a service or class to a selection category or grade by promotion or by transfer may be revised by the State Government. Such revision may be made by the State Government either suo motu at any time or on a petition submitted by any aggrieved member within six months from the date of passing the order :
>
> Provided that the said period of six months may be extended by the State Government if sufficient cause is shown for the delay in the submission of the petition."

The above quoted Rule, by virtue of Rule 7 of the Special Rules and also for the reasons mentioned earlier, mutatis mutandis applies in this case also. So, the High Court can suo motu revise any promotion at any time. Therefore, the

claim of the appellant that he is entitled to get automatic retrospective effect for his promotion and the rival contention of the 1st respondent that an incumbent, who is superseded once can never get retrospective promotion cannot be accepted. So, we hold that the High Court has power to review the promotions and order promotions with retrospective effect in appropriate cases.

13. So, the point that arises for decision is whether the retrospective effect given to the promotion of the appellant and the third respondent is justified on the facts of the case and whether the interference made by the learned Single Judge with the same should be upheld or not. The technical contention raised by the learned Senior Counsel for the High Court that the writ petitioners should have challenged the promotion in toto, otherwise their challenge to the retrospectivity alone should be repelled is plainly untenable. Even if an order is bad, one need challenge it only to the extent it is adverse to him.

14. The dates of promotion to the posts of Selection Grade District and Sessions Judge and Super Time Scale of the parties concerned as per Ext.P6 are given below for convenient reference :

Name	Selection Grade	Super Time Scale
S.Sainudeen (3rd respondent)	15/03/99	01/05/03
M.L.Joseph (Appellant)	15/03/99	01/09/04
Thomas.P.Joseph (First respondent)	03/07/00	27/10/04
P.Bhavdasan	12/07/00	28/10/04
S.S.Satheesachandran	12/07/00	31/10/04

The promotion given to the third respondent in the "short duration vacancy" from 09.09.2002 to 03.10.2002 is ignored, as no regular promotion can be given to such a short duration vacancy, but only to substantive vacancies. See the definition of vacancy of short duration in Note (2) to Rule 5 of Part II KS & SSR, which provides that leave vacancies and vacancies of less than 6 months' duration shall be treated as vacancies of short duration.

15. Going by the materials produced in this Writ Appeal, we do not find that the Administrative Committee has given any reason for giving retrospectivity to the promotion of the appellant and the third respondent. From the counter affidavit filed by the High Court, it is seen that the confidential reports upto the date of Ext.P6 order were also taken into account for ordering promotion. It means, the incumbents were promoted, not taking into account, the confidential reports for three years immediately preceding the date when

their turn arose as per their seniority position in the lower post. The learned Senior Counsel appearing for the High Court has filed a statement, containing the details of the confidential reports for the relevant periods. For convenient reference, the same is extracted below :

> "1) Thomas P.Joseph was promoted as Super-time Scale District Judge with effect from 27.10.2004.
>
> Confidential Reports of Thomas.P.Joseph for the relevant period (3 years)

01.01.2001	to	17.05.2001	:	Good
19.05.2001	to	30.11.2001	:	Good
10.12.2001	to	31.12.2001	:	Good
01.01.2001	to	31.12.2002	:	Good
01.01.2003	to	31.08.2003	:	Very efficient
01.09.2003	to	31.12.2003	:	Good
01.01.2004	to	06.05.2004	:	Very Good

> 2) P.Bhavadasan was promoted as Super-time scale District Judge with effect from 28.10.2004.

Confidential Reports of P.Bhavadasan for the relevant period (3 years)

06.09.2000	to	02.07.2001	:	Good
03.07.2001	to	05.09.2001	:	Satisfactory
06.09.2001	to	30.09.2002	:	Good
10.10.1002	to	31.12.2002	:	Good
01.01.2003	to	31.08.2003	:	Good
01.09.2003	to	31.12.2003	:	Good
01.01.2004	to	03.05.2004	:	Good
04.05.2004	to	30.10.2004	:	Good

3) S.S.Satheesachandran was promoted as Super -time Scale District Judge with effect from 28.10.2004.

Confidential Reports of S.S.Satheesachandran for the relevant period (3 years)

01.01.2001	to	31.12.2001	:	Good
01.01.2002	to	02.05.2002	:	Good
31.05.2002	to	31.12.2002	:	Very

efficient

01.01.2003	to	31.08.2003	:	Very Good
01.09.2003	to	31.12.2003	:	Good
01.01.2004	to	31.12.2004	:	Very Good

4) S.Sainudheen was promoted as Super-time Scale District Judge with effect from 09.09.2002.

Confidential Report of Sri.S.Sainudeen for the relevant period (3 years)

01.01.1999	to	31.12.1999	:	Good
01.01.2000	to	23.11.2000	:	Good
24.11.2000	to	19.02.2001	:	Average (should show more application)
20.02.2001	to	31.12.2001	:	Good
01.01.2002	to	31.10.2002	:	Good

Confidential Report of Sri.S.Sainudeen for the subsequent period (not relevant)

01.01.2003	to	31.12.2003	:	Adverse entry
26.03.2004			:	Adverse entry communicated

27.04.2004	:	Representation to expunge the adverse entry
01.01.2004 to 14.05.2004	:	Not satisfactory
17.05.2004	:	Adverse Entry communicated
02.06.2004	:	Representation to expunge the adverse entry
05.07.2005	:	Adverse remarks for the period from 01.01.2003 to 31.12.2003 were expunged as per order dated 5.7.2005.
05.07.2005	:	Adverse remarks for the period from 01.01.2004 to 14.05.2004 were expunged as per order dated 5.7.2005.

5) M.L.Joseph Francis was promoted as Super-time

Scale District Judge with effect from 19.09.2004.

Confidential Reports of Sri.M.L.Joseph Francis for the relevant period (3 years)

01.01.2001 to 31.12.2001	:	Satisfactory
02.04.2002	:	Entry communicated
01.01.2002 to 31.12.2002	:	Satisfactory
01.01.2003 to 11.04.2003	:	Just satisfactory
12.04.2003 to 31.08.2003	:	Good
01.09.2003 to 31.12.2003 (adverse entry)	:	Not satisfactory
24.06.2004	:	Adverse entry communicated
02.07.2004	:	Representation to expunge Adverse entry
03.08.2004	:	Representation to expunge adverse entry rejected by order dated 3.8.2004
20.08.2004	:	Rejection order communicated
01.01.2004 to 11.05.2004	:	Not satisfactory (adverse entry)

04.12.2004	:	Adverse entry communicated
19.05.2005	:	Representation to expunge adverse entry
01.06.2005	:	Adverse remarks for the period from 01.01.2004 to 11.05.2004 were expunged as per order dt.1.6.2005."

The confidential reports in many cases are not written for a particular year. One year is split into more than one part. The date of effect of promotion of the third respondent is 01.05.2003. So, his confidential reports for the period from 01.05.2000 to 30.04.2003 can be reckoned, as the claim for promotion was considered long after the above period was over. Going by the confidential reports, the ratings for the above period disclosed are in the following manner :

01.05.2000 to 23.11.2000 - about 7 months	:	Good
24.11.2000 to 19.02.2001 - 3 months	:	Average
20.02.2001 to 31.10.2002 - 19 months	:	Good
01.11.2002 to 31.12.2002 - 2 months	:	No comments by the Controlling Judge

01.01.2003 to 31.05.2003 - 5 months		:	Adverse entry later deleted

Out of the total period of 36 months, the third respondent has thus, good rating for a period of 26 months. Out of the balance 10 months, the rating for three months is average. For two months, there is no rating. The period for which the adverse entry is deleted, cannot be treated as a period with good rating. Whether it should be treated as a period with nil rating or some other rating, is a matter for the Administrative Committee, to decide.

16. The date of effect of promotion of the appellant is 31.08.2004. So, the confidential reports for the period from 01.09.2001 to 31.08.2004 have to be taken into account. The ratings disclosed by the annual confidential reports, going by the statement filed by the High Court, are given below :

01.09.2001 to 31.12.2002	16 months	:	Satisfactory
01.01.2003 to 11.04.2003	About 3 months	:	Just satisfactory
12.04.2003 to 31.08.2003	5 months	:	Good
01.09.2003 to 31.12.2003	4 months	:	Not satisfactory

01.01.2004 to 11.05.2004	4 months	:	Adverse, but deleted
12.05.2004 to 31.08.2004	4 months	:	Good

Out of the 36 months, the appellant has got good rating only for about 9 months. 19 months' rating is only 'satisfactory'. For 4 months, it is adverse and for another 4 months, the adverse entry is deleted. Whether that period should be treated as favourable period or adverse period, is a matter to be decided by the Administrative Committee. Going by the state of affairs revealed by the annual confidential reports and also in principle, the view taken by the learned Single Judge that on removal of the adverse entries, the incumbents will not become meritorious candidates, has to be upheld. The Administrative Committee, it appears, has proceeded on the footing that once the adverse remarks are removed, they are entitled to get promotion automatically with effect from the date their turn arose. With respect, we would point out that the Committee should have independently evaluated the merits of the appellant and the third respondent vis-a-vis the other claimants, in the light of the principles governing promotion, based on merit-cum-seniority. The Apex Court

in ***B.V.Sivaiah v. K.Addanki Babu*** (1998(6) SCC 720), has explained the said concept in the following words.

> "The principle of 'merit-cum-seniority' lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. In the context of Rule 5(2) of the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955, which prescribed that `selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority', Mathew J. in **Union of India v. Mohan Lal Capoor** (1973) 2 SCC 836) has said : (SCC p.856 para 37).
>
> '*For inclusion in the list, merit and suitability in all respects should be governing consideration and that*

seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale.'" *(emphasis supplied)*

The Apex Court has also held in ***Chandra Gupta v. Secretary, Government of India*** (1995) 1 SCC 23) that on expunging the adverse remarks, restoration of promotion is not automatic. The relevant portion of the said decision reads as follows :

"No doubt, a special review is provided for under clause III(vi) of the Government 's order dated 31.01.1985.That reads as follows :

'*Special review may be done in cases where the adverse remarks in the officers' annual confidential reports are expunged subsequently as a result of their representations.*'

On this score,we are unable to hold that on the expunction of adverse remarks and consequential promotion, the appellant would date back to the date when it was due. First of all, the method of selection is :

'*Selection should be made on merit with due regard to seniority in terms of Rule 3(3) of the Indian Forest Service (Pay) Rules, 1968.*'

That Rule reads as follows :

'3.Time scale of pay - (1) * * *

(2) * * *

(3) Appointment to the Selection Grade and to posts carrying pay above the time scale of pay in the Indian Forest Service shall be made by selection on merit with due regard to seniority.

Therefore, what is essential is merit and not mere seniority. This Court in **Sant Ram**

Sharma v. State of Rajasthan (AIR 1967 SC 1910) has stated as follows : (SCR p.118)

'*...it is a well-established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone. The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is therefore available.*'

Again, this Court in ***State of Mysore v. Syed Mahmood*** *(AIR 1968 SC 1113) held thus :*

'*Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone.*'

Therefore, even assuming the best in favour of the appellant as a consequence of expunction of adverse remarks, the appellant's case was

liable to be reviewed by the Departmental Promotion Committee for the post of Chief Conservator of Forests as on the date when Respondents 3 to 5 were promoted it could be done, provided the appellant was found suitable for promotion on the basis of record. Our attention has not been drawn to any record from which conclusion could be arrived at that after the expunction of adverse remarks, the record of service of the appellant was more meritorious than that of Respondents 3 to 5.

The learned counsel for the appellant strongly relies on **R.K.Singh v. State of UP** (1981) 2 SCC 674). This Court at pages 126-127 held thus (SCC para 2).

'There is no dispute that during the pendency of this appeal, the appellant's representation against the adverse entries has been allowed and these entries have been expunged from his service record. Since the adverse entries were expunged, the State Government by its order dated 24.01.1991 granted Selection Grade to the appellant with effect from the date he takes over charge. We fail to appreciate the view taken by the State Government. Once the adverse entries awarded to the appellant were expunged, the appellant is entitled to Selection Grade with effect from 1.1.1986 the date on which he was eligible for grant of Selection Grade. We, accordingly, allow the appeal, set aside the order of the Central Administrative Tribunal and modify the order of the State Government dated 24.01.1991 and direct that the appellant shall be treated in Selection Grade with effect from 1.1.1986 and he

will be entitled to all other consequential benefits with effect from that date. As regards appellant's further promotion, he will be considered for promotion in accordance with Rules'.

What requires to be carefully noted is eligibility for promotion is one thing while actual promotion is a different thing. Even in this ruling, promotion in accordance with the rules alone was what was directed. Even assuming on the strength of this ruling, the appellant is entitled to promotion on the date when he became eligible for promotion, but for these adverse entries, a factual finding requires to be rendered on the following aspects :

1. Whether the adverse entries for 1980-81 and 1981-82 were actually communicated ?

2. After expunction of adverse remarks,

> whether there was a comparative estimate of the merits by the Departmental Promotion Committee ?" *(emphasis supplied)*

Neither the records produced nor the averments in the counter affidavit would show that there was a comparative evaluation of the merits of the candidates with reference to the date of occurrence of the vacancy. So, the decision to promote the appellant and the third respondent with retrospective effect is vitiated by omission to take into account, relevant facts. There is manifest failure in addressing relevant matters. So, the decision is unreasonable in the "Wednesbury" sense and therefore, ultra vires and unauthorised.

17. We feel that the various other decisions cited by both sides are not strictly relevant to the facts of this case. So, we are not referring to them in detail. But, we feel that the decisions cited by the learned counsel for the third respondent to contend that once the adverse entries are removed, promotion is automatic, have to be mentioned. The decision in ***R.K.Singh v. State of UP*** *(1991) Supp. (2) SCC 126),* is a short order, which says that if a person is denied selection grade, as a result of the adverse entries in his confidential reports, he is entitled to get retrospective promotion on expunging them. The

said decision, apparently, does not deal with a promotion governed by merit-cum-seniority. Therefore, that decision cannot have any application to the facts of this case. The third respondent also relied on a decision of the learned Single Judge of this Court in ***Radha v. State of Kerala*** (2005(4) KLT SN 17 (Case No.20). The said decision also says, the promotion to the selection grade is automatic on expunging the adverse remarks. But, what are the Rules governing that promotion, are not evident from the decision. As held by the Apex Court in ***Chandra Gupta v. Secretary, Government of India*** (1995) 1 SCC 23), where the promotion is to be ordered on the basis of merit, the incumbent cannot get automatic promotion on expunging the adverse remarks. In the result, the Judgment of the learned Single Judge, quashing the retrospectivity given to the promotion of the appellant and the third respondent herein in upheld. But, the direction given by the learned Single Judge to the High Court to issue fresh proceedings in the place of Ext.P6, granting promotion to the appellant and the 3rd respondent as Super-time Scale District Judges, prospectively from 09.11.2005 is vacated and the High Court is given liberty to re-evaluate the merits of the appellant and the third respondent, comparing the same with the merit of others in the field of choice and pass

fresh orders as to with effect from which date, they can be given promotion. Needless to say, the promotion of the writ petitioners have become final long ago. The only modification permissible is the date of effect of their promotion and that too, for giving retrospective effect to the promotion of the appellant and the third respondent, if they are found eligible for promotion with retrospective effect, on evaluation of their confidential reports and comparing the same with that of the writ petitioners and others in the field of choice. Until such exercise is completed, the writ petitioners shall be treated as seniors to the appellant and the third respondent herein in the super time scale post.

18. The learned counsel for the High Court pointed out that the learned Single Judge issued certain directions as to how the selection to the Super-time Scale should be made. They are unwarranted, it is submitted. The suggestions made by the learned Single Judge are well meaning suggestions, meant to improve the process of selection to the Super-time Scale. They need not be taken as binding directions to be implemented, when next time the question of placement in the Super-time Scale is taken up for consideration. If the Administrative Committee proposes to modify the method of selection, the suggestions made by the learned Single Judge deserve consideration. In other

words, they need not be treated as directions to be implemented mandatorily.

The Writ Appeals are disposed of as above.

K.BALAKRISHNAN NAIR,JUDGE

20.07.2007 **T.R.RAMACHANDRAN NAIR,JUDGE**

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